TEE HON

v.

CHONG CHEK AH & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 183 OF 1985]
9 AUGUST 1986

CIVIL PROCEDURE: *Accounts & Inquiries - Manner of conducting inquiries under O. 43 - Registrar sole arbiter - Whether O. 44 r. 4 complied with - Registrar's report and order did not follow From 86 as required by O. 44 r. 21(1) - Requirement is mandatory - Effect of failure to comply with rule.*

CIVIL PROCEDURE: *Consent order - Effect - Direction for accounts and inquiries - Whether within purview of O. 44 r. 2 RHC 1980 - Special directions under O. 44 r. 3 - Whether hearing constituted a proper inquiry.*

CIVIL PROCEDURE: *Rules of court - Proceedings not conducted in accordance with Rules of Court - Registrar's findings and report - Whether report to be treated as an award on par with that of arbitrator - Manner proceedings were conducted - Whether rendered award nullity - Registrar's report and order set aside and discharged - Accounts and inquiries be carried out before another Registrar.*

In this case, the plaintiff upon filing an appeal against the report and order dated 30 June 1985 of the Senior Assistant Registrar to the Judge in chambers on 2 July 1985, applied by a summons-in-chambers for an order that all further proceedings on the said order dated 30 June 1985 (which was made pursuant to a consent order dated 9 June 1985) be stayed and that the verification of accounts be carried out *de novo.* The grounds of the application were that the Registrar did not go through the plaintiff's accounts and documents properly, relied solely or heavily on the defendants' documents and did not give the matter due consideration because he was resigning from service on the day his report was made and did not have the time.

Held:

[1] Since the effect of the consent order was in reality a direction for accounts and inquiries the matter came squarely within the purview of O. 44 r. 2 of the RHC 1980. However, the Court was satisfied that the hearings before the Senior Assistant Registrar did not constitute a proper inquiry in any sense of the term.

[2] The Registrar being made the sole arbiter of the fortunes of the parties O. 44 r. 4 should have been complied with but it was not followed and no directions were sought or given. As for O. 44 r. 21 RHC 1980, the Registrar's report and order did not follow Form 86 as required by O. 44 r. 21(1) and which was mandatory.

[3] The agreement between the parties to be finally bound by the Registrar's findings put this case in a special category and his report must be treated as an award on par with that of an arbitrator. However, the manner in which these proceedings were conducted rendered that award a nullity, and it is for that reason that the Registrar's report and order is set aside and discharged.

[4] The Court directed that the accounts and inquiries necessitated by the consent order dated 9 June 1985 be carried out before another Senior Assistant Registrar of this High Court in compliance with O. 43 of the RHC 1980. Since the Registrar's decision was to be final, the Court directed that if he deems it expedient to have the assistance of a chartered accountant he shall be at liberty to obtain it as provided by O. 32 r. 12 and debit the fees payable to him as part of the costs of the case.

[Registrar's order dated 30 June 1985 set aside and discharged. Accounts and inquiries be carried out before another Senior Assistant Registrar. Costs of application reserved and follow event of Registrar's eventual disposal of this matter.]

Cases referred to:
Wyndham v. Jackson [1982] 2 All ER 109
In re Taylor, Turpin v. Pain [1890] 44 Ch D 128
Solomon v. Solomon [1859] 28 LJ Ex 129
Banks v. Banks [1835] 1 Gale 46
Williams v. Wallis and Cox [1914] 2 KB 478
Government of Ceylon v. Chandris [1963] 1 Lloyd's Rep 214
Re Hutchinson, Hutchinson v. Norwood [1884] 32 WR 392

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 12, O. 43 rr. 4, 5, O. 44 rr. 2, 3, 21(1), 23, 23(1)(a)

Other sources referred to:
Mallal's, Supreme Court Practice, 2nd Edn., p. 400

For the plaintiff - Lee Wee Hong; M/s. Ghazali & Salim
For the defendants - Hj. Abdul Kariem Bashir; M/s. Bashir & Co.

JUDGMENT

Mahadev Shankar J:

This matter arises out of a dispute which required the Senior Assistant Registrar to determine what, if anything, was due from the parties to each other.

Belantara Enterprises Sdn. Bhd. (Belantara) is a saw-milling company in Gemas. The plaintiff Tee Hon (Tee) was a substantial shareholder therein. Chong Chek Ah the first defendant (Chong) was a substantial shareholder in Taman Untong Sdn. Bhd (Taman Untong). Tee and Chong had some negotiations in early October 1984 with a view to increasing the profitability of Belantara Enterprises Sdn. Bhd. and Taman Untong Sdn. Bhd. These negotiations crystallised into a written agreement dated 24 October 1984. Collateral arrangements are also said to have been made and other parties apart from Tee and Chong became involved. There were cross-transfers of shares in Belantara to Chong and /or his nominees arranged for by Tee, and in Taman Untong to Tee and/or his nominees by Chong. The upshot of all this was that Chong became the financial controller of Belantara on or about 25 October 1984 and his brother the second defendant became its managing director.

All this involved the movement of money from one coffer into another, and the assumption of financial obligations incidental thereto.

But alas, the expected profits did not materialise and by early 1985 the parties were at war with each other.

In March 1985 Tee filed this suit, for annulment of the agreement and consequential orders. He obtained an *ex parte* injunction. A brisk battle of affidavits followed. Vehement allegations and counter allegations were made. But mercifully the parties were able to agree to what in colloquial terms may be called a Mexican stand-off.

On 9 June 1985 the parties registered a consent order. Its objective was to restore the *status quo* in so far as practicable. This involved *inter alia* the repayments by Tee to Taman Untong moneys received by Belantara, the assumption of liability for a mortgage raised by Chong for Belantara, and for its trade debts, the cross-transfers of shares and so on. Although specific sums of money have been mentioned the terms of the order make it clear that nothing was to be paid until the Registrar had verified the claims being made.

The critical words of this order are those to be found in Clause 7. The Senior Assistant Registrar was to take accounts and enquiries to determine all sums which were due from the parties to each other. It therefore is a reasonable inference that the exercise of verification earlier referred to was in fact a taking of Accounts and Enquiries in the manner provided by the Rules of the High Court.

Also significant is the term that the Registrar's findings shall be final and conclusive.

On 19 June 1985 the defendants took out a summons in chambers returnable on 25 June 1986 for the purpose of verification. The summons was supported by Chong's affidavit setting out the grounds of his claim and annexing various accounting documents.

On 25 June 1986 Tee filed his affidavit. He attacked the various claims made by the defendants and in para. 8 and 9 of his affidavit he averred as follows:

> 8. It is my further belief and contention that if all the documents of accounts; namely receipt books, bank statements, cash books, payment vouchers, ledgers, journal and details of sales and purchases of the company during the period 26 October 1984 and 1 April 1985 are placed before the Learned Senior Assistant Registrar of this Court for the purposes of a proper and full investigation and verification of the accounts and set-offs between the parties, it will be shown that it is the defendants who should pay Belantara and not the other way around.
>
> 9. Consequently, it is my contention that until and unless the full accounts and all documents related thereto are placed before the Learned Senior Assistant Registrar for his verification and certification, it would be impossible to say, by merely looking at isolated vouchers and receipts, which party must pay what sums to the other party.

He then proceeded to give examples of alleged selective accounting on the part of the defendants and ended up with a prayer as follows:

> 12. By reason of matters aforesaid, I respectfully pray to the Court to order both parties to produce and deliver to the Court all documents referred to in para. 8 above to enable the Court to arrive at the true accounts and set-offs. On my part I undertake to produce and bring into Court all documents and books of account that are in the possession of the company.

On 29 June 1985 defendants filed an affidavit by a certified public accountant that he had found Chong's accounts in order. A further affidavit was filed by Chong annexing copies of the day book for receipts from 25 October 1984 till 25 February 1985, cash and cheque payments for some period and receipts issued by the new management from 31 October 1984 till 31 December 1984. (I observed as to this last that the receipts do not proceed in chronological order. Receipts 3915 till 3946 being dated 31 December 1984 and receipts 3947 till 3973 dated 31 October 1984).

Based upon this material and nothing more than the submissions of the parties, the Registrar proceeded exercise in conducting his verification. On 30 June 1985 he issued a "report on verification of accounts", in the following terms:

> Whereas by this order in this action (encl. Vol. 43) dated 9 June 1985 and order No. 1 the plaintiff is to pay the 3rd defendant the sum of RM200,000 paid to and received by Belantara Enterprise Sdn. Bhd. and/or Mr. Kwan Jin Ya in respect of the acquisition of Belantara shares order No. 2 the plaintiff is also to pay to the 3rd defendant another sum of RM50,000 advanced by Taman Untong to Belantara Enterprise Sdn. Bhd. as loans, order No. 3 the plaintiff is to under take that Belantara enterprise to take over and pay off fully the mortgage loan agreed at RM140,000 order No. 4 the plaintiff is personally is to guarantee the repayment of all trade debts owing by Belantara Enterprise Sdn. Bhd. to Syarikat Malaysia Kilang Papan (Estimated to be RM70,000 to RM80,000) order No. 7 the 1st defendant is to account to Belantara Enterprises Sdn. Bhd. all sums that may be found due and owing to Belantara Enterprises Sdn., Bhd. from (except salary allowances properly drawn) which sums may be set off against payments/refund referred to in the said Order.
>
> And all the matters stated above under O. 1, 2, 3, 4 and 7 were referred to me for verification by way of scrutinising the relevant accounts thereof on 25 June 1985 and shook over for continued hearing to 29 and 30 June 1985:
>
> Now I hereby report that I have been attended by Mr. Lee wee Hong Counsel for the plaintiff and Tuan Haji Abdul Kariem Bashir Counsel for the defendants and having gone through the affidavit and evidence presented by both sides and the plaintiff and the 1st defendant being present and having heard both the Counsel thereon.
>
> I REPORT and ORDER that I find that:
>
> (1) the plaintiff is to pay the 3rd defendant *vide* O. 1 the sum of RM200,000.
>
> (2) Under O. 2 I disallowed the RM50,000 as money advanced by Taman Untong to Belantara Enterprises as loans.
>
> (3) Under O. 3 plaintiff is to discharge the mortgage debt amounting to RM140,000 raided by the 1st defendant for the use and benefit of Belantara Enterprises Sdn. Bhd.
>
> (4) Under O. 4 the plaintiff is to guarantee payment of trade debts owing by Belantara Enterprises to Syarikat Malaysia Kilang Papan in the sum of RM70,000.
>
> (5) Under O. 7 the 1st defendant's salary claim verified at RM9,000 and as I further find that the 1st defendant owes Belantara Enterprises Sdn. Bhd. RM9,000 under the O. 7 I hereby order that the said salary claim of RM9,000 is to be set off with the said RM,9,000 owing to Belantara Enterprises Sdn. Bhd.
>
> (6) And I further order that each party to pay their own costs.

Against this report and order the plaintiff filed and served a notice of appeal to a Judge in chambers on 2 July 1985. This was followed up by a summons-in-chambers praying for the following orders viz: that all further proceed up on the order dated 30 June 1985 be stayed and that the verification of accounts be carried out *de novo*. The grounds urged were that the Registrar did not go through the plaintiff's accounts and documents properly, relied solely or heavily on the defendants documents, and did not give the matter due consideration because he was resigning from service on the day his report was made and did not have the time.

In his affidavit in support Tee's contention was that the Registrar's method of verification was merely to sight the documents produced before him without subjecting the material to any critical test to determine the credibility of the material being put forward by either party.

Indeed the Registrar's report avers that the matters were referred to him "for verification by way of scrutinising the relevant accounts."

This summons came before me on 19 August 1985. On that day the "appeal" filed on 2 July was pending and I put the plaintiff on terms to provide security for RM200,000 by 8 September by way of bank guarantee failing which the appeal was to stand dismissed. I fixed the matter for disposal on 9 September 1985.

On that day Tee was still trying to raise the security and the parties made submissions before him on the issue as to whether the Registrar had conducted himself properly in the manner of the verification of the claims. A real difficulty now presented itself. Not only was the notes of evidence of the Registrar illegible in parts, it was also unhelpful in the sense that if there was a process of reasoning to be discerned from it, the conclusions could not be reconciled with the findings stated in the "report and order" engrossed, fair copied, and dated 30 June 1985.

The matter was therefore adjourned for a proper transcript to be produced, and execution was stayed meanwhile.

On 19 October 1985 there was further argument. The transcript could not be made any clearer despite the best efforts of the Registry. The issues which then arose may be summarised as follows:

(1) Had the Registrar misconducted himself in the manner in which he proceeded to verify the claims, by merely relying upon a sighting of the respective documents filed by the parties?

(2) If there was a proper appeal pending against the Registrar's decision, by virtue of the notice given on 2 July 1985 had the appeal lapsed by virtue of the failure to provide security by 8 September 1985.

(3) Should the application by the plaintiff to stay proceedings under the Registrar's report, and for such further order as the justice of the case required, be treated as an application to discharge or vary the Registrar's certificate under O. 44 r. 23 of the RHC and if so was it out of time under O. 44 r. 23(1)(a) and were there special circumstances empowering the Court to act under O. 44 r. 23(3)?

(4) In disallowing the plaintiff in the course of hearing from producing or referring to evidence contained in the affidavits filed prior to the consent order to disprove claims made by the defendants had the Registrar denied the plaintiff a fair hearing?

This was a consent order and the parties had agreed that the Registrar's findings should be conclusive. In retrospect and although neither party raised the point it seems to me that the Registrar's findings should be treated as an award from which no appeal lies: See *Wyndham v. Jackson* [1938] 2 All ER 109. The issue as to whether the appeal lapsed is therefore misconceived and the order for security must be regarded as having been made *per incuriam.*

The enquiry of this Court into the other issues raised reveals serious lapses which resulted in a total denial of a proper hearing and it seems to me that this muddle arose because of a misapprehension and a misapplication of all the relevant rules of Court by all parties concerned.

Since the effect of the consent order was in reality a direction for accounts and enquiries the matter came squarely within the purview of O. 44 r. 2 of the RHC. Although the parties had pre-empted the Court by formulating the consent order in terms, this was a case in which

special directions could have been sought under O. 44 r. 3. That was not done. The parties merely filed a collection of documents by way of annexures which was in no sense a compliance with O. 43 r. 4. Consequently neither party gave the other or the Senior Assistant Registrar advance notice of the points on which the "accounts" filed were regarded as being erroneous (see O. 43 r. 5) or the points on which cross-examination was desired. In the result the hearing before the Registrar appears to have become a free for all. Apart from the documents filed, and the contentions of Counsel no *vica voce* evidence was led, and the Registrar was left in a position where he was forced to make findings of credibility without the proper material or guidance.

With respect to all concerned I have found the Registrar's notes of evidence of the hearings before him totally unintelligible, but making the best of them I am satisfied that by whatever name it be called, the hearings did not constitute a proper inquiry in any sense of the term.

Another feature which appears from the Registrar's notes is the fact that the further Affidavit filed by Chong in support of his case (encl. 49) was served on the plaintiff's Counsel on the day of hearing. Accounting disputes are difficult enough as it is. In the present case no adequate opportunity was afforded to plaintiff's Counsel to cross check these documents, and the further affidavit was accepted at face value judging from the many references to it in the Registrar's notes. The refusal to allow the plaintiff to refer to contradictory material in the earlier affidavits was also a serious denial of justice.

The parties did not refer the Registrar to the provisions of O. 43 nor did they cite any precedents to how accounts and inquiries should be conducted (see *In re Taylor, Turpin v. Pain* [1890] 44 Ch D 128) and we have the kind of muddle here for which all parties concerned must take an equal share of the blame.

Counsel for the defendants appears to have treated the entire matter from the time of the Consent Order onwards as having come within the purview of O. 44. Since the Registrar was mde the sole arbiter of the fortunes of the parties O. 44 r. 4 should have been complied with. It was not, and no directions were sought or given. As for O. 44 r. 21, the Registrar's report and order did not follow form 86 as required by O. 44 r. 221(1). Nor does his report refer to any documents or parts thereof and to such of the evidence so as to make it clear upon what the result stated in the certificate is founded. The rule is mandatory as to this requirement.

As to O. 44 r. 23(1)(a) Mr. Lee of Counsel has urged me to treat his notice of appeal given within 4 days of the Registrar's report as a summons to discharge the certificate. In the alternative he relies upon O. 44 r. 23(3) which empowers me to discharge the Registrar's certificate in special circumstances.

As I have earlier indicated, the agreement between the parties to be finally bound by the Registrar's findings puts this case in a special category and his report must in my view be treated as an award on par with that of an arbitrator. But the manner in which these proceedings were conducted rendered that award a nullity, and it is for that reason that I now set aside and discharge the Registrar's report and order.

By way of judicial precedents support of the views that I have heretofor expressed reference may be made to the following.

(a) That the Registrar should have given the plaintiff reasonable time to consider the further Affidavit filed by Chong: See *Solomon v. Solomon* [1859] 28 LJ Ex 129;

(b) That the Registrar was not merely to rely upon the affidavits when in fact he should have taken evidence to determine the credibility of the assertions made by the parties. See *Banks v. Banks* [1835] 1 Gale 46;

(c) That the Registrar was not entitled to refuse to consider the evidence contained in the previous affidavits of the defendant: *Williams v. Wallis and Cox* [1914] 2 KB 478;

(d) That the Registrar should have given both the parties an adequate opportunity of considering each other's evidence: *Government of Ceylon v. Chandris* [1963] 1 Lloyd's Rep 214.

I think that consequential upon my order it has become necessary for me to direct that the accounts and inquiries necessitated by the consent order be carried out before another Senior Assistant Registrar of this High Court in compliance with O. 43 of the RHC. Since the registrar's decision is to be final I also direct that if he deems it expedient to have the assistance of a chartered accountant he shall be at liberty to obtain it as provided by O. 32 r. 12 and debit the fees payable to him as part of the costs of the case: See *Re Hutchinson, Hutchinson v. Norwood* [1884] 32 WR 392 and Mallal's *Supreme Court Practice,* 2nd Edn., p. 400.

The costs of this application will be reserved and follow the event of the Registrar's eventual disposal of this matter.

Also found at [1987] 2 CLJ 473